IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 4

EMANUEL BROWN,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

In this reply brief we shall avoid, insofar as possible, repeating the arguments set forth in our main brief. We shall direct ourselves principally to certain new arguments made by the Government.

I

Replying to Government's Point I (Gov't Br., 16, *et seq.*).

(1) The Government argues (Gov't Br., 21, 22, 26) that §305(d) must be construed the same as §916(a), Water Carriers Act, and §1017(a), Freight Forwarders Act (both Title 49, U.S.C.). These latter two sections in language entirely different from §305(d) specifically, without limitation, incorporate §46 and make its immunity provision applicable to both Commission and grand jury proceedings. The Government says that Parts I

(Railroad), III (Water Carriers), and IV (Freight Forwarders) of the Interstate Commerce Act are in *pari materia* with Part II (Motor Carriers) and that, therefore, the immunity grant in the last Part is equivalent to that in the other Parts of the Act.

While the 1940 preamble to the Interstate Commerce Act declared the Nation's transportation policy and the intention of Congress to provide an integrated regulatory system of railroad, water and motor carriers, it effected no change in the specific provisions covering each element of that system.

In *Consolidated Freightways* v. *United Truck Lines*, 216 F. 2d 543 (C.A. 9th), cert. den. 349 U. S. 905, plaintiff, a certificated motor carrier, sued an uncertificated motor carrier for damages for the diversion of traffic from the plaintiff on its certificated route. The Court of Appeals held that the cause of action for damages allowed by §§8 and 9 of the original Interstate Commerce Act did not give a cause of action for money damages for a similar violation of the Motor Carriers Act, which does not provide such a remedy.

The original Interstate Commerce Act, provides for fine and imprisonment for offenses under Part I (Title 49, U.S.C., §§10, 20(7)(b)) while the Motor Carriers Act, §322 provides only for fines. Obviously on a prosecution under §322, Motor Carriers Act, a court could not impose a sentence of both fine and imprisonment on the Government's theory that these Parts of the Interstate Commerce Act are in *pari materia* to be read and considered interchangeably.

While §1019, Freight Forwarders Act, Title 49, U.S.C., contains an amnesty for certain acts done prior to its effective date, the Motor Carriers and Water Carriers Acts have no such provision. This amnesty could not be imported into the three other Parts on the Government's theory of integration and *pari materia*.

Moreover the preamble "cannot enlarge or confer powers or control the words employed in the provisions of the Act itself." *In re American States Public Service Co.*, 12 F. Supp. 667, 681.

(2) The Government's reference to the Congressional Record in its brief (p. 24) is not at all illuminating. These were committee amendments, there was no debate and no explanation was given by the committee for the amendments.

The amendments [both adopted simultaneously in time as one amendment to one section] did not affect the substance of §305(d). In the first clause the donees of the powers granted are restricted by the language "the Commission * * * and joint boards shall have the same power." The amendment to this clause did not limit or expand this grant; after its adoption the first clause said the same thing as it did before.

Similarly, in the second clause between the original text "as are provided in part I" and the adopted words, "as though such matter arose under Part I", there is no apparent difference which could be said to bear upon this problem of construction. It is the repetition in the second clause of the words of the first clause: "any matter under investigation", not the language of the amendment, which confines the statutory proffer of immunity to those who are "subpoenaed or testifying" perforce before the Commission under its power given by the first clause to compel testimony.

(3) At page 29 of its brief the Government urges that the judicial history of §46 "is a gloss on" §305(d). This "judicial gloss" is of no help in determining whether the inclusion in §46 of grand juries as bodies able to grant immunity was carried over into §305(d). *Shapiro* v. *United States*, 335 U. S. 1, 20, cited by the Government,

involved the Price Control Act which also incorporated §46 by reference. Significant here is that that immunity provision by the terms of its incorporation was limited to the Price Administrator and did not extend to grand juries (Pet'rs. Br., 17, 18, 43, 44). The question involved here was not raised or considered in the *Shapiro* case.

(4) Nor does this case raise the question of the scope of the grand jury's power to investigate, as implied by the Government (Br., 19); it does put forward the issue of that body's power to grant immunity under a statute such as §305(d)—since the grand jury has no inherent power to grant immunity, such power exists only when specifically granted.

II

Replying to Government's Point II (Gov't Br., 33, *et seq.*).

Petitioner in Point II of his brief (p. 19, *et seq.*) argues that the language at the commencement of §305(d) "so far as may be necessary for the purposes of this chapter" limits the immunity purportedly granted and makes it inadequate as a substitute for the Constitutional privilege.

The Government now, as it did on the petition for certiorari, argues (Gov't Br., 33) as though petitioner had claimed that the phrase "in connection with any matter under investigation under this chapter" limited the immunity to offenses arising under the chapter.

But that is not petitioner's point and no answer is suggested by the Government to the argument actually made.

III

Replying to Government's Point III (Gov't Br., 35, *et seq.*).

The Government concedes that, after petitioner had been directed by the Court to return to the grand jury room and answer and there persisted in his refusal to answer, contempt proceedings therefor could have been instituted against him under Rule 42(b) and that such proceedings would have had to be on notice, since such contempt was not in the presence of the Court (Gov't Br., 40). The Government itself says that "such a proceeding would have been necessary 'to inform the court of events not within its own knowledge'" (Gov't Br., *ibid*).

But, the Government argues, the contempt for which petitioner was convicted was not his second recalcitrance in the grand jury room; the contempt was committed when petitioner was again returned by the grand jury to the courtroom, and there upon interrogation by the Court, refused to answer the questions and stated that he would persist in such refusal, if returned to the grand jury room (Gov't Br., 35).

The Court of Appeals held (R. 62) that "this hearing before the District Judge was * * * merely a proceeding ancillary to the grand jury investigation," that the District Court was "merely being advised as to what had already happened before the grand jury" and that petitioner "had already made it clear, both to the grand jury and the Court, that he refused to answer." The Court of Appeals concluded (R. 62) that, even if petitioner had "remained mute and refused to speak at all, the result would have been the same."

The Court of Appeals thus, contrary to the Government's position here, held that petitioner's second recalcitrance in the grand jury room was disobedience in the

actual presence of the Court punishable, summarily under Rule 42(a).

This refusal by the Court of Appeals to follow Rule 42(b) and *Ex Parte Savin*, 131 U. S. 267, the Government now rejects, because it admits that, if the contempt punished was that allegedly done in the grand jury room, petitioner must be prosecuted on notice under Rule 42(b) and that, if the Court was to be advised of what happened in the grand jury room, that is, as to "'events not within its own knowledge'", a proceeding under Rule 42(b) "would have been necessary" (Gov't Br., 40).

The Government nevertheless seeks to justify the conviction as a contempt punishable under Rule 42(a). It asserts that the proceedings on petitioner's second return to the courtroom were a continuation of the grand jury proceeding before the Court (R. 40; Gov't Br., 44). The Government argues that the District Judge chose not to consider as a complete contempt petitioner's second refusal in the grand jury room to answer the questions directed to be answered.[1]

The Government's argument based upon this theory of continuation of the grand jury proceeding, cannot sustain the conviction here. It is as erroneous as that of the Court of Appeals.

(1) In the grand jury room petitioner had definitely, effectively and completely indicated his refusal to answer the questions directed to be answered. Neither the District Court nor anybody else could subjectively determine that that act, if a contempt, was not complete and consider it open subject to being closed by further acts of the petitioner. The Court of Appeals was undoubtedly correct in holding that his contempt, if any, was then complete. Its error was in deciding that he could for such act be con-

[1] The Government's theory is apparently that the District Court had the power of amnesty for the alleged contempt before the grand jury. This is self-evidently not so. If it were a contempt, it remains such, prosecutable under Rule 42(b).

victed under Rule 42(a). The alleged contempt being complete in the grand jury room, the result of the Government's shift of position is the multiplication of contempts.

Strikingly apposite here is *United States* v. *Costello,* 198 F. 2d 200, 204 (C. A. 2nd) where Judge A. N. Hand said:

> "We are of the opinion that the convictions on Counts 7, 9, 10 and 11 must be reversed. Each of those counts dealt with the defendant's refusal to answer a specific question put to him after he had flatly refused to give any further testimony on that particular day. Certainly the refusal to testify was an act in contempt of the Committee for which the defendant was subject to the punishment prescribed by the statute. But when the defendant made his position clear, the Committee could not multiply the contempt, and the punishment, by continuing to ask him questions each time eliciting the same answer: his refusal to give any testimony. In other words, the contempt was total when he stated that he would not testify, and the refusals thereafter to answer specific questions can not be considered as anything more than expressions of his intention to adhere to his earlier statement and as such were not separately punishable." (Emphasis in original.)

Even under *Yates* v. *United States,* 355 U. S. 66, the result is the same. Here there is an invalid attempt to multiply offenses which is even more startling, because it avoids the basic rights of petitioner under the Constitution and under Rule 42(b), adopted and promulgated by this Court to govern criminal contempt proceedings and which, as conceded by the Government, would require a hearing on notice for what transpired in the grand jury room on petitioner's second recalcitrance.

(2) If, indeed, what transpired before the District Judge was a continuation of the grand jury proceeding, it could only be an invalid and improper proceeding.

Subdivision (d) of Rule 6 of the Federal Rules of Criminal Procedure provides that only Government attorneys, witnesses under examination, interpreters when needed, and a stenographer, may be present while the grand jury is in session.

But here in this so-called "continuance of the grand jury proceeding", there were intruders, to wit, the Judge (R. 36), the clerk (R. 45), "probably some Court-attendants" (Gov't Br., 49), petitioner's counsel (R. 36), the court stenographer and the grand jury stenographer (R. 37).

This so-called continuation of the grand jury investigation was therefore unlawful. *Latham* v. *United States*, 226 Fed. 420 (C.A. 5th).

As Judge Call said in the *Latham* case, *supra*, 424:

> "The right of the citizen to an investigation by a grand jury pursuant to the law of the land is invaded by the participation of an unauthorized person in such proceedings, be that participation great or small. It is not necessary that participation should be corrupt, or that unfair means were used. If the person participating was unauthorized, it was unlawful. * * *"

See also *United States* v. *Edgerton*, 80 Fed. 374 (D. Montana); *People* v. *Minet*, 296 N. Y. 315.

The Government's characterization of the proceedings as a continuation of the grand jury investigation is thus bottomed upon an illegal and invalid proceeding. Certainly, if petitioner had answered the questions before the Court, any indictment based thereon would have been invalid because of the intruders. *A fortiori*, how can a contempt proceeding be based upon an order issued in an unlawful and invalid proceeding. The whole proceeding must necessarily fall.

(3) The Government also contends (Br. 44) that, if before this grand jury-judge tribunal petitioner had

answered the questions, he would have had immunity. If the immunity statute were applicable to grand jury proceedings, it necessarily presupposes a validity thereto. Since the proceedings as a grand jury proceeding were invalid, no immunity could attach and petitioner could claim his privilege against self-incrimination and the court's order to answer was not lawful.

(4) The Government's attempt to sustain the conviction here on the theory of a continuance of the grand jury proceeding is attempted to be justified (Gov't Br., 37, 38) historically. The claim is made that the proceeding here is merely that which was followed at common law and that that is all to which petitioner is entitled. The Government equates the power of the Court to compel testimony of recalcitrant grand jury witnesses with the power to punish for contempt.

The Government, of course, has confused the Court's powers of compulsion utilizable in proceedings affecting recalcitrant grand jury witnesses, especially after they have once been directed to answer.

The matter, however, is clarified in one of the cases cited by the Government. In *People ex rel. Phelps* v. *Fancher,* 4 Thompson & Cook (N. Y.) 467 (Gov't Br., 37), a grand jury witness refused on invalid grounds to answer a certain question and was committed to the county jail "until he may answer the questions propounded to him which he has refused to answer." The witness was released on habeas corpus on the ground that the imprisonment could not exceed thirty days. The General Term (an appellate court) held that the discharge of the witness was illegal, that the Court had the right to commit the recalcitrant witness until he answered the questions and that the term of the commitment could not be limited to the statutory thirty days.

But the General Term very clearly drew the distinction at common law, which, it is submitted, is applicable here,

between the commitment of a witness until he shall answer and the punishment as for a contempt, saying at page 471:

> "Independent then of any statute authorizing the court of oyer and terminer to commit a witness for refusing to answer a proper question until answered, that court has ample power at common law to order such a commitment. *Such a proceeding is not one to punish a party as for a contempt, but the exercise of a power necessarily conferred to elicit truth and to administer justice.* It was not necessary to bring Mr. Shanks before the court, and formally adjudge him to be guilty of a contempt, but *upon his refusal to answer the question which the court adjudged to be proper, it might, by simple rule, have ordered him to be confined until he should answer.* After this step had been taken, the court had ample power to punish for the contempt of its lawful authority. The two proceedings are separate and distinct, and the exercise of the one in nowise conflicts with the exercise of the other." (Emphasis supplied)

This distinction apparently applies to the Federal courts as well. In *Loubriel* v. *United States,* 9 F. 2d 807, 809 (C.A. 2d), Judge Learned Hand pointed out that the commitment of the grand jury witness until he shall answer the questions was not an attempt to punish him as for a contempt "but to compel him to perform his duty."

It is not disputed here that the power to compel the testimony sought is vested in the Court (Gov't Br., 38), but the conviction here for criminal contempt was punitive, not compulsory. Accordingly the requirements of due process and of Rule 42(b) had to be complied with.

(5) It is difficult to understand the repeated citation by the Government of *Carlson* v. *United States,* 209 F. 2d 209 (C.A. 1) as authority for its contentions (Gov't Br., 39). As pointed out in petitioner's main brief (p. 25, *et seq.*) and as clearly appears from the excerpt

quoted by the Government (Br., 39), the *Carlson* case makes plain that after the direction of the Court to answer questions, the refusal of the recalcitrant witness in the grand jury room to answer the questions, can only be punished in a prosecution as a contempt under Rule 42(b).

The Government attempts to argue (Gov't Br., 40, fn. 16) that *Carlson* v. *United States, supra* and *Wong Gim Ying* v. *United States*, 231 F. 2d 776 (C.A. D.C.) are distinguishable, and states that it is not suggested in either case "that after an initial disobedience to the court's order to return to the grand jury room and answer the questions, the court cannot then order the witness to answer the questions in the presence of the grand jury and summarily hold him in contempt on his refusal to obey such final order."

The *Wong Gim Ying* case, *supra*, clearly states what is to happen if a witness is returned to the grand jury room and has again improperly refused to answer the specific questions as directed by the Judge.

Judge Danaher said at page 780:

> "Had she been so directed, and had she then improperly refused to answer the specific questions pursuant to the judge's ruling that her self-incrimination claim lacked foundation, the next step would have called for prosecution on notice. In that circumstance, she would have received the protection of Rule 42(b).
>
> "The 'failing to testify before the grand jury, as directed' obviously did not occur in the presence of the District judge. He did not see or hear the conduct constituting the contempt. Thus the adoption of the Rule 42(a) procedure was invalid, and it is clear that the requirements of Rule 42(b) were not complied with."

In conclusion, Judge Danaher said at page 780:

> "We will, therefore, remand this case with directions that the Government, if it elects to proceed

with this appellant as a witness, accord to her the full protection to which she is entitled."

This is the procedure followed in the United States District Court for the District of Columbia,—see *Powell* v. *U. S.*, 226 F. 2d 269 and *Traub* v. *U. S.*, 232 F. 2d 43—and in other circuits—see *Camarota* v. *U. S.*, 111 F. 2d 243 (C.A. 3). *Cf: Paul* v. *U. S.*, 36 F. 2d 639 (C.A. 9)[2]

(6) *Summary:* While the District Court might have exercised its power of compulsion to commit the petitioner until he make answer to the questions, neither the views of the Court of Appeals nor the arguments of the Government in this Court can sustain the District Court's attempt to use Rule 42(a) to punish him for contempt—only proceedings under Rule 42(b) could be used to accomplish this result. In such proceedings petitioner was entitled to the due process outlined by Rule 42(b) and the rights of a defendant in a criminal case, including the right not to testify. If the proceeding here was a continuation of the grand jury proceeding, it was invalid, no lawful order could be issued by the District Court and the petitioner's claim of privilege was proper as the purported immunity could not attach in such an unlawful grand jury proceeding. The Government's argument leads to a multiplication of contempts.

Nor was this conviction necessary to the speedy and effective administration of criminal justice. The power of the Court to commit until answer is made remained un-

[2] The Government cannot argue (see Gov't Br., 37) that this Court's reversal in *Curcio* v. *U. S.*, 354 U. S. 118 and *Rogers* v. *U. S.*, 340 U. S. 367, on the Fifth Amendment questions presented was tantamount to an approval of the procedure followed. The Government made the same argument as to *Rogers* in *Curcio* in opposition to certiorari in the latter case (O.T. 1956, No. 260, Br. in opp. to pet. for cert., pp. 16, 17 and fn. 6); this Court nevertheless granted certiorari.

The *Rogers* case, *supra*, is, moreover, not in point, because there the gravamen of the complaint was the alleged denial of counsel. (O.T. 1950, No. 20, Petr's Pet. for Reh., pp. 9, 10, 11).

abridged. And so the observations of the Court of Appeals (R. 61) cited by the Government (Br., p. 43) are inapposite. The basic issue of procedural unfairness and the abrogation of Rule 42(b) cannot be obscured by concern for speedy criminal justice, especially where, as here, ample judicial power otherwise exists.[3]

IV

Replying to Government's Point IV (Gov't Br., 50, *et seq.*).

The Government attempts to justify the length of sentence by comparison with other contempt cases, ignoring the sentences in cases similar to the one at hand involving recalcitrant grand jury witnesses set forth at page 31 of petitioner's brief.

Green v. *United States*, 356 U. S. 165 referred to by the Government involved persons convicted of felonies who had jumped bail and had become fugitives despite

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[3] With respect to the issue of secrecy in the courtroom at the time of the proceedings on April 8, 1957, no extended reference need be made to the Government's argument (Gov't Br., 46 *et seq.*). The Government concedes at page 48 of its brief that "there were, in fact, no spectators in the courtroom." It would appear from the Government's brief at pages 48 and 49, that the persons present were the Judge, Court attaches, the prosecutor, the grand jury and petitioner and his counsel. Unlike the Assistant United States Attorney, the Government's informant, petitioner's counsel is unable to state whether any members of the public sought admission during the proceedings, as he, along with the Assistant United States Attorney, was otherwise occupied at the counsel table in the proceedings then being conducted in the courtroom. It is not claimed that petitioner's counsel made any request, explicit or otherwise, for the admittance of the public. With reference to the Government's remark that in the circumstances there was "no occasion for the Trial Judge to rule upon the question of secrecy" (Gov't Br., 48), it will suffice to recall the fact that on April 5, 1957 the courtroom was ordered cleared (Gov't Br., 47; R. 6) and that the prosecutor on that day said to the Court that it is the procedure to clear the courtroom (R. 6). The proceeding on April 8th was specifically stated by the prosecutor to be another request for the aid and assistance of the Court with reference to the petitioner (R. 36).

notice and knowledge of a direction by the Court to appear for surrender and to commence the service of sentence. *Hill* v. *United States ex rel. Weiner*, 300 U. S. 105, cited by the Government, involved a two-year sentence for contempt for the violation of a decree in a suit prosecuted by the United States under the Federal Anti-Trust Act.

Lopiparo v. *United States*, 216 F. 2d 87, 92 (C.A. 8), (Gov't Br., 52), where there was a sentence of 18 months "or until the further order of this Court", involved the credibility and good faith of a witness who testified that he was unable to find certain books he was ordered to produce. *Warring* v. *Huff*, 122 F. 2d 641 (App. D. C.) (*ibid*) involved two contempt sentences, each for 13 months, to run consecutively, which were affirmed. It appears from the companion case, *Warring* v. *Colpoys*, 122 F. 2d 642 (App. D. C.) that the contemnor had pleaded guilty to criminal contempt charges, that he had used money to influence a prospective juror and had investigated the possibility of influencing another prospective juror.

Conley v. *United States*, 59 F. 2d 929 (C.A. 8) (*ibid*) involved a sentence of two years for criminal contempt arising out of an attempt to "fix" a criminal case and to procure its dismissal for a consideration.

United States v. *Lederer*, 140 F. 2d 136 (*ibid*, 53) was a violation of an injunction restraining the defendant from selling meat at prices in excess of the OPA maximum price regulation. *Creekmore* v. *United States*, 237 Fed. 743 (C.A. 8) (*ibid*, 53) involved an attempt to corrupt a trial juror.

Hence the cases cited by the Government on the question of the length of sentence are inappropriate and have no bearing on the question of the sentence properly to be meted out to a contemnor who has refused to answer questions before a grand jury as to a crime for which only a monetary fine may be imposed.

CONCLUSION

For all the reasons stated herein and in petitioner's main brief, the conviction here should be reversed and acquittal directed.

Respectfully submitted,

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